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IN THE

Supreme Court of the United States

1972

No.

UNITED STATES OF AMERICA *ex rel.*,
FRANK PHELAN, *Respondent*

v.

JOSEPH R. BRIERLEY, Warden,
State Correctional Institution
Philadelphia, Pennsylvania, *Petitioner*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Commonwealth of Pennsylvania, through the District Attorney of Philadelphia, respectfully requests that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above-captioned case on January 30, 1973.

ORDERS BELOW

The Order of the United States Court of Appeals for the Third Circuit remanding the case to the District Court with orders to grant the writ of habeas corpus unless the Commonwealth of Pennsylvania should resentence Phelan to a new sentence other than the death penalty is unreported and is printed as Appendix B attached hereto, and the order of that court denying the petition of the Commonwealth for remand for an evidentiary hearing is unreported and is printed as Appendix C attached hereto. The order of the Honorable Alfred L. Luongo of the United States District Court for the Eastern District of Pennsylvania ordering that the writ of habeas corpus shall issue unless the Commonwealth of Pennsylvania shall resentence Phelan to a sentence other than death is unreported and is printed as Appendix D attached hereto.

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit denying the Commonwealth's petition issued on January 30, 1973. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Is not the Commonwealth of Pennsylvania entitled to a hearing at which it can present factual and statistical evidence and legal analysis to demonstrate that the death penalty in Pennsylvania is not applied in violation of the standards discussed by this Court in *Furman v. Georgia*, — U.S. —, 92 S.Ct. 2726 (1972), but is instead applied to a narrowly circumscribed group of the most heinous crimes, without arbitrariness or discrimination, and under increasingly careful guidelines from the Supreme Court of Pennsylvania?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides, in pertinent part, that "cruel and unusual punishments" shall not be inflicted.

The Pennsylvania Murder Statute, Act of June 24, 1939, P. L. 872, §701, as amended by Act of December 1, 1959, P.L. 1621, §1, 18 Pa. Stat. Ann. §4701, provides, in pertinent part, that:

> All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree. . . .
>
> Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall, in the manner hereinafter provided, fix the penalty. In the trial of an indictment for murder, the court shall inform the jury that if they find the defendant guilty of murder in the first degree, it will be their further duty to fix the penalty therefor, after hearing such additional evidence as may be submitted upon that question. . . . . After a verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of the penalty to be imposed upon the defendant, and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances. The jury shall then retire and consider the penalty to be imposed and render such verdict respecting it as they shall agree upon.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review an order of the United States Court of Appeals for the Third Circuit in United States ex rel Phelan v. Brierley, Civil Action No. 18,880, denying a petition of the Commonwealth of Pennsylvania for remand to the District Court for an evidentiary hearing at which the Commonwealth would have the opportunity to show, by presentation of evidence and legal analysis, that the death penalty in Pennsylvania has not been imposed in violation of the standards discussed by this Court in *Furman v. Georgia*, — U.S. —, 92 S. Ct. 2726 (June 29, 1972).

Procedural history relevant to this proceeding:

On June 29, 1972, this Honorable Court entered an order in the instant case as follows:

> The motion for leave to proceed in *forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings. See *Stewart v. Massachusetts*, — U.S. — (1972) *Phelan v. Brierley*, — U.S. —, 92 S. Ct. 2875 (1972).

Thereafter, on December 13, 1972, the Commonwealth of Pennsylvania, by the District Attorney of Philadelphia County, petitioned the Third Circuit Court of Appeals for remand to the District Court for an evidentiary hearing as to the constitutionality of the death penalty as applied in Pennsylvania. Respondent Frank Phelan, by his counsel, filed a response in opposition to the Commonwealth's petition. On January 30, 1973, the Third Circuit Court of Appeals entered two orders: The first remanded the cause to the district court with instructions to order that the writ of habeas corpus issue unless the Commonwealth should within a predetermined reasonable time resentence Phelan

to a sentence other than the death penalty; this order was to issue forthwith. The second order of the Third Circuit Court of Appeals denied the Commonwealth's petition for remand to the district court for an evidentiary hearing as to the constitutionality of the death penalty as applied in Pennsylvania.

Pursuant to the mandate from the Court of Appeals, on February 1, 1973, the Honorable Alfred L. Luongo, of the United States District Court for the Eastern District of Pennsylvania, issued an order that the writ of habeas corpus issue enlarging Phelan from custody unless within one hundred and twenty days the Commonwealth of Pennsylvania should resentence him to a sentence other than the death penalty.

Factual history and earlier procedural history:

At about 4:00 A.M. on June 19, 1964, Judith Lopinson and Joseph Malito were shot to death in the basement office of Dante's Restaurant, 1809 Chestnut Street, Philadelphia. At the time, this restaurant was owned by Malito and Judith's husband, Jack Lopinson.

On July 15, after an inquest conducted by the Medical Examiner of the City of Philadelphia, Jack Lopinson was charged with the murders and held for action of the Grand Jury.

On July 25, Phelan was arrested in connection with another incident. While he was in custody a friend of Phelan's revealed to the police that Phelan had bragged to him about committing the murders in Dante's Restaurant. On July 26, Phelan was charged with the murders and a hearing was conducted before a magistrate, at which hearing Phelan's friend testified against him. The magistrate committed Phelan to the Holmesburg prison on the murder charges pending action of the Grand Jury. At this time Phelan told the police that he had disposed of the murder weapons for Jack Lopinson but denied that he had anything to do with the actual killings.

On July 27, Phelan summoned the senior official at the Holmesburg prison and told him that "he wanted to confess who committed the murders down at the restaurant" (R. 295a).[1] The prison official contacted homicide detectives and the following morning Phelan was taken to Police Headquarters for questioning. Phelan made a full and detailed statement about his participation in the murders.

He told the police that he had met Jack Lopinson in early 1964. During the spring of 1964, Lopinson began talking to him about killing Lopinson's wife, Judy. Phelan and Lopinson had several discussions about the best way to kill her. For example, Lopinson considered telling his wife to drive the car home early and park in the back alley, where Phelan would be waiting with a knife. This would "look like an attack by a mad man, like a holdup . . ." (R. 200a). Lopinson then changed his mind, and "decided that to make like a mob hit, where he would be with her and he would get shot in the leg, a little bit and she would get shot in the head" (R. 200a).

But Lopinson then decided that he wanted Phelan to kill his business partner, Joseph Malito, as well as his wife. Lopinson suggested one plan for killing Judy and Malito, but Phelan did not like it. Accordingly, the two then decided that the killing would be committed at Dante's (R. 201a).

About a week before the killing, Phelan and Lopinson drove to Delaware, where Lopinson bought nine guns for about $250 (R. 202a). They also bought some ammunition. When they returned to Philadelphia, Phelan test fired the guns and gave six of them back to Lopinson (R. 203a).

Lopinson finally decided when the "thing" was to take place, and he gave Phelan a .32 and a .38 caliber revolver.

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1. This citation is to the two volume printed Record prepared as part of the appeal to the Supreme Court of Pennsylvania. The paging referred to is the paging of the entire Record rather than individual sections, each number printed at the center of the top of the page of the Record.

The two men then worked out the details of their plan (R. 203a).

On Thursday, June 19, Phelan went to Dante's about 9 or 10 o'clock in the evening. He and Lopinson reviewed the plan once more and Lopinson gave Phelan $225. Phelan's statement to the police describes the step by step movements which led to cold-blooded murder:

> We got out of the car and walked in Dante's from the rear entrance. The two of us went in the cellar, then Jack fixed the trap door that leads out into Ranstead Street. He put somethin in there to leave the trap door open a couple of inches.
>
> Then I went into the office with him and I started cleaning the guns off. He started to help me, but he was more interested in drinkin. I did it myself, he was kinda nervous. I put the guns back in the back of the cellar, right where the floor drops down and where they store the cases of beer. I took a beer box and set it up, so that I would be able to sit on it. I go upstairs, Jack went up before me. I walked through the building to the bar. I was drinking very light rum and coke.
>
> Now it's about ten after three. I left the place because Jack gave me the cue with a nod of his head. . . . I cut through the parking lot to Ranstead Street and to the back of Dante's.
>
> I opened the trap door that Jack had fixed, jumped down in there, pushed the other door open and closed the trap door behind me and the other door too. I went to the back of the cellar where I had the beer box fixed and I sat down and waited. I sat there and waited about 5 minutes when Judy came down. She went in the office.
>
> Then it was a while before Joe came down. I would say it was almost about 10 minutes. He went right into the office and he was carrying a tin receipt box. Then I waited till the juke box played. Then the juke box played, that was the signal when the juke box played

a certain tune, that was the time for me to go in and do the "thing". I wait for about 10 seconds to make sure the juke box is playin right. I'm pretty sure that the 38 was in my right hand and the 32 was in my left hand.

I got off the box, walked into the office. I seen Malito was bending over the safe directly in front of the safe, kneeling down. Judy was sittin in the chair alongside the desk. I shot Joe first, he fell directly on his left side. A fraction of a second later I shot Judy. Both were show (sic) in the head. Then I shot her again and shot him again. Then I think he died right away and she put her head down on the desk on her arm and she was talking to me. She was saying, "Frank, Frank, what happened?" I sat down on the sofa and I told her, "Don't worry about it, that it will be all over very soon." Then I went upstairs.

When I came out of the kitchen door I hit the floor, so, I said, "Where you at mother fucker?" I said, "You better answer real fast." Then Jack answered me, he was up front near the juke box. I expected that Jack would try to shoot me. Jack said, "I'm here," and I told him to throw his hands up. I told him to hut (sic) his gun in my belt. He had his suit open like he was ready to draw his gun. I had both guns on him and he put his gun in my belt. Then I took him down the cellar, we went into the office and Judy and Malito's bodies were still pulsating like the last moments and Jack told me to shoot them again. Before Jack and me went down to the basement I had washed my hands with vinegar in the kitchen. Then I take Jack down the cellar. He said that I should shoot them again, so I shoot them again. The last time I fired at Joe, I shot him with my right hand. When we went down, Judy was sitting up in the chair and I shot her on the right side of the face, then her head went down on the desk again.

She was still moaning, so, I shot her in the back of the head. She straightened up in the chair, she spun

around and her head fell back against the wall. Jack ran upstairs, up the steps, looked out the back door. I had gone up with him, then he went to the front door, then he sat down and waited for about 10 minutes. We were wittin (sic) in a booth in the bar. He said, "What would I do if, all of a sudden, a lot of cars pull up around the front and back door." I told him not to worry about it. Jack said it was a good job.

Then he ran in the back again, looked out the back door again, then he threw the key to the back door on the hallway floor. Then we went into the dining room, then I shot him in the leg. He braced himself for a shot and when I shot him, he fell down. I shot him with the .32. After I shot him I walked toward the back door, when I got in the hallway, I threw him his gun back.

I left through the back door and went to the parking lot and got in my car. I forgot to tell you, that I put the guns in a brown paper bag that Jack gave to me. I drove out Ranstead Street and up 18th, over Race Street. When I got to Delaware Avenue I made a left turn and after a short while, at one of the piers, I threw the guns into the river. Then I went up Delaware Avenue and over Frankford Avenue and home" (R. 205a-210a).

Phelan was interrupted while giving this statement and taken to City Hall to permit him to appear in court and testify, under oath, at a hearing on a habeas corpus petition instituted by Lopinson. He told the same story under oath that he had just given to the police (R. 212a-238a). At this hearing, and before Phelan testified, Phelan was fully advised by the Court of his right to have counsel present to consult with and to advise him, but Phelan insisted that he did not need counsel, despite the fact that his family had retained counsel for him who was present in the courtroom.

On August 11, the Philadelphia Grand Jury indicted Phelan for the murders of Judith Lopinson and Joseph Malito and for conspiracy to commit those crimes.

Phelan entered a guilty plea to the charges, and after various delays a hearing on the guilty plea was held and Phelan was found guilty of murder in the first degree. On October 19, 1965 a sentence of death was imposed. On appeal, the Supreme Court of Pennsylvania affirmed. *Commonwealth v. Phelan*, 427 Pa. 265 (1967). A petition for writ of certiorari was filed in the Supreme Court of the United States and denied on May 20, 1968. *Phelan v. Pennsylvania*, 391 U.S. 920 (1968).

A Petition for Writ of Habeas Corpus was then filed in the United States District Court for the Eastern District of Pennsylvania which was denied after hearing on March 31, 1970. The United States Court of Appeals for the Third Circuit first reversed the denial of the writ and then, after reargument, affirmed the District Court's denial of the writ on October 26, 1971. *United States ex rel Phelan v. Brierley*, 453 F. 2d 73 (3d Cir. 1971).

Phelan thereafter petitioned this Court for a writ of certiorari to review the judgment of the Court of Appeals, and this Court entered the order quoted above, under Procedural History of the Case.

ARGUMENT

The Commonwealth of Pennsylvania is entitled to an evidentiary hearing in the District Court at which it can present factual and statistical evidence and legal analysis in order to demonstrate that the death penalty in Pennsylvania is not applied in violation of the standards discussed by this Court in *Furman v. Georgia*, but is instead applied to a narrowly circumscribed group of the most heinous crimes, without arbitrariness or discrimination, and under guidelines from the Supreme Court of Pennsylvania.

The orders of the United States Court of Appeals denying the evidentiary hearing requested by the Commonwealth and remanding the case to the district court with orders to issue the writ unless Phelan was resentenced to a sentence other than death, are based on this Court's prior order vacating the judgment insofar as it left undisturbed the death penalty imposed and remanding the case for further proceedings. That order, in turn, was based on this Court's earlier decisions in *Stewart v. Massachusetts*, — U.S. —, 92 S. Ct. 2845 (1972) and *Furman v. Georgia*, — U.S. —, 92 S. Ct. 2726 (1972).

The per curiam order of the Court in *Furman v. Georgia* provides in pertinent part that:

> The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.

Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Marshall each filed a separate opinion in support of the judgments. Since the judgments of the Court required the concurrence of each

of these justices, the holding of the Court can have no broader application than those points which command the acceptance of all of the justices.

Only two members of the Court, Mr. Justice Brennan and Mr. Justice Marshall, reached the question of whether capital punishment was cruel and unusual *per se* and concluded that it was. Mr. Justice Douglas, Mr. Justice Stewart and Mr. Justice White, on the other hand, did not reach the question of the *per se* constitutionality of capital punishment but concurred in the judgments of the Court, concluding that the specific death sentences before them were cruel and unusual punishment. In general, the conclusions of the foregoing three justices, whose concurrence was essential to the judgment of the case, were based on the discriminatory and/or arbitrary application of a non-mandatory death penalty as evidenced by its application in the cases before the Court, which cases arose in States other than Pennsylvania.

Specifically, Mr. Justice Stewart concluded "that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." — U.S. at —, 92 S.Ct. at 2763. He based this conclusion upon a belief that capital punishment had not been imposed on many persons convicted of crimes as reprehensible as the petitioners' acts and that the petitioners were "among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." — U.S. at —, 92 S.Ct. at 2762. While it may be true that capital punishment has not been imposed on many persons convicted of crimes as reprehensible as the acts of the petitioners in *Furman* and its companion cases, in Pennsylvania no one who had committed a crime which was merely as reprehensible as the acts of those petitioners would be punished with the death penalty. Of course, in the companion cases of *Jackson v. Georgia* and *Branch v. Texas* where the crime charged was rape, death would not be a possible penalty under Pennsylvania law, since only first

degree murder is punishable by death under Pennsylvania law. 18 P.S. §4701, *supra*. However, while the penalty of death was under the statutory language a possible penalty for the felony-murder committed by Furman, the Pennsylvania practice for at least the last decade has consistently been to impose a sentence of imprisonment for life where during the course of a felony death resulted, but no violent acts were intentionally committed on the victim and where the victim's death was caused accidentally during the course of the felony. (See opinion of Mr. Justice Douglas, noting that Furman claimed that his gun went off accidentally when he fell during his escape from the burglarized premises, and that the Georgia Supreme Court accepted his version of the shooting as an accidental one during the course of the robbery. — U.S. —, 92 S.Ct. at 2754-55, fn. 48.) That is, if the factual situations presented to this Court in *Furman* and its companion cases had arisen in the state courts of Pennsylvania, in none of those instances would Pennsylvania practice have allowed imposition of the death penalty.

Indeed, the Philadelphia case now before this Court is an excellent example of the careful and appropriate way in which the death penalty has been applied in Pennsylvania, as were the only three other death cases to reach the Supreme Court from Philadelphia since the moratorium against capital punishment began in 1967. *See Lopinson v. Pennsylvania*, 392 U.S. 647 (1968), vacating and remanding 427 Pa. 284 (1967); *Coyle v. Pennsylvania*, 392 U.S. 647 (1968), vacating and remanding 427 Pa. 72 (1967), and 415 Pa. 379 (1964); *Scoleri v. Pennsylvania*, — U.S. —, 92 S.Ct. 2852 (1972), vacating death penalty in and remanding *Commonwealth v. Scoleri*, 432 Pa. 571 (1968). Moreover, the Commonwealth of Pennsylvania is prepared to show that not only these cases, but the other Pennsylvania cases in which capital punishment has been imposed, would not be cruel and unusual punishment within the language of the opinions of several of the concurring Justices in *Furman v. Georgia*.

The three Pennsylvania cases above and the instant case, like the other Pennsylvania death cases, are clearly reprehensible to a degree that is almost unique even among first degree murder cases. Thus, Jack Lopinson was a restaurant owner who hired Frank Phelan, respondent herein, to assassinate Mrs. Lopinson and his business partner in a staged robbery, and Phelan carried out the killing with a degree of viciousness which must have satisfied Lopinson's deepest hates. Anthony Scoleri climaxed a career marked by 25 convictions for robbery by robbing and murdering a shopkeeper, committing a further series of armed robberies and pistol whipping during his post-murder flight. The predictability of the death penalty in Pennsylvania can be seen from this case in which two juries and a panel of judges imposed the death penalty in three successive trials. Finally, John Coyle went into hiding in Philadelphia following robberies in New England, gunned down a Philadelphia police officer in cold blood when he caught Coyle stealing milk, and then left Philadelphia on a rampage of crime which ended in two further shootouts with the police in Massachusetts. The decision of judges or juries to impose the death penalty in such cases as these cannot be labelled capricious.

Mr. Justice Stewart specifically stated that the Court, in deciding *Furman* and its companion cases, was not faced with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances. The *Furman* decision, according to his opinion, left open the question of whether a state legislature could constitutionally determine that certain criminal conduct is so atrocious as to warrant the penalty of death. — U.S. at —, 92 S.Ct. at 2761. In Pennsylvania, the determination that certain conduct warrants the death penalty has been a joint determination made by the legislature and the courts, the legislature limiting the death penalty to first degree murder cases, and the courts providing increasingly careful guidelines for the determination of the appropriate penalty, *e.g.*, *Commonwealth v. Bell*, 417 Pa. (1965), and limiting

the death penalty to only heinous crimes where consideration of the criminal histories and psychiatric conditions of the defendants show no mitigating factors. *Commonwealth v. Green*, 396 Pa. 129 (1965).

Mr. Justice White concluded that a non-mandatory death penalty is so rarely applied that it cannot be said to carry out any legislative policy. — U.S. at —, 92 S.Ct. at 2763-64. However, the Pennsylvania cases discussed above are, as noted above, good illustrations of the fact that within the small class of the most heinous first degree murders the death penalty is applied with considerable regularity except when there are clear mitigating factors which would make it inappropriate to sentence a given defendant to death despite the atrocious nature of his criminal acts. Mr. Justice White's opinion was based on his conclusion that there is no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. — U.S. —, 92 S.Ct. at 2764. It is precisely for the purpose of demonstrating that there is such a reasonable basis for making this distinction among Pennsylvania cases, that the Commonwealth believes that an evidentiary hearing is required.

Finally, Mr. Justice Douglas concluded that a non-mandatory death penalty is unconstitutional because he believed that death sentences were often imposed on minorities or the poor. Yet, once again, the death cases from Philadelphia which have been before the Supreme Court make it clear that this is not the case in Pennsylvania. Neither Lopinson nor Phelan nor Scoleri nor Coyle was black or a member of any other minority group. Lopinson was a wealthy restaurant owner (*Cf.* Mr. Justice Douglas' statement that: "One searches our chronicles in vain for the execution of any member of the affluent strata of this society," — U.S. —, 92 S.Ct. at 2733) and nothing in the record available to the Commonwealth indicates that either Phelan, Scoleri or Coyle was less than a member of the middle classes. Indeed, each of the others was represented by private counsel including a number of leading members

of the bar at some time in the proceedings and Lopinson and Coyle have always been so represented. On the other hand, the Supreme Court of Pennsylvania has held that, as a matter of law, youth, mental deficiency, *negritude* and the disabilities of a ghetto childhood require the reversal of a death penalty imposed upon even the perpetrator of an atrocious crime. *See, e.g., Commonwealth v. Green*, 396 Pa. 129, *supra*. Thus, at least for more than a decade, the danger of discriminatory application of the death penalty which provided the major basis for the opinion of Mr. Justice Douglas and concerned Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall has not existed in Pennsylvania. Mr. Justice Douglas' opinion states that "a law which in the overall view reaches that result [economic and racial discrimination] has no more sanctity than a law which in terms provides the same. Thus, these discretionary statutes are unconstitutional in their operaton." — U.S. —, 92 S.Ct. at 2735. If a law is proved not to reach such a result, but is instead proved to be non-discriminatory in its application as well as on its face, it would not fall under this opinion.

Under these circumstances, the Commonwealth of Pennsylvania requests the opportunity to present statistical evidence on the issue of the constitutionality of the death penalty as applied in Pennsylvania and to prepare a record from which this Court can properly weigh the imposition of the death penalty in Pennsylvania. Notions of federal-state comity require that such an opportunity be given to the Commonwealth of Pennsylvania, where its statutes are automatically deprived of effect on the grounds that other states' similar but more-inclusive statutes are being unconstitutionally applied. As this Court stated in *Younger v. Harris*, 401 U.S. 37, 43, 91 S. Ct. 746, 750 (1971), comity mandates "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments. . . . [Our concept of federalism] represents a system in which there is a sensitivity to the legitimate interests of both State and National Governments, and in which the National Government,

anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

In deciding *Furman v. Georgia* and its companion cases, this Court had the benefit of briefs on behalf of counsel for the State of Georgia, the State of Texas, and numerous *amici curiae*. But no brief on behalf of the Commonwealth of Pennsylvania relating to the constitutionality of the death penalty as applied in its jurisdiction was filed in that case, nor was the Commonwealth given the opportunity to present argument or evidence in the instant case.

Since the holding of this Court in *Furman v. Georgia* is not that the imposition of the death penalty is cruel and unusual under all circumstances but merely that it was cruel and unusual under the circumstances of the cases before the Court, *cf. Bartholomew v. State*, — Md. —, 12 Cr. L. 2313 (December 4, 1972) (dissenting opinion), it is clearly material that the Commonwealth of Pennsylvania be given the opportunity to establish that capital punishment as applied to Pennsylvania cases is not cruel and unusual within this Court's interpretation of the Eighth Amendment. Therefore, the Third Circuit Court of Appeals should have ordered the district court to conduct the evidentiary hearing requested by the Commonwealth, so that a factual basis could have been established for consideration of the issue.

There are, as other courts have recognized, a number of unresolved problems in the application of *Furman* to the states, which situation requires something more than automatic resentencing to a sentence other than death. It must be considered, for example, whether the Furman decision requires reversion to death penalty statutes which are mandatory in all cases. The Supreme Courts of North Carolina and Delaware, and a trial court in Utah, have held that the *Furman* decision does not render capital punishment impermissible under all circumstances, but renders it impermissible only when it is imposed in accordance with statutes making imposition discretionary with the jury.

State v. Waddell. — N.C. —, 12 Cr. L. 2361 (January 18, 1973); *State v. Dickerson*, — Del. —, 12 Cr. L. 2145 (November 1, 1972); *State v. Winkle*, Utah Superior Ct., as reported in *The Evening Bulletin*, Phila., Pa., p. 41 (January 24, 1973). In those states, as in Pennsylvania, the death penalty statutes originally were mandatory, but were later amended to provide for imposition of a penalty of life imprisonment at the jury's discretion. The state courts held that this amendment allowing for mercy had to fall under the *Furman* decision, leaving the mandatory death penalty provision in effect under state rules as to severability.

In the alternative, courts must consider the broader issue of whether a particular state's law is in fact in violation of the *Furman* rationale, for the blanket upsetting of sentences without due consideration of that issue will further confuse the law and result in even wider discrepancies in sentencing. The notion of federal-state comity, the recognition of the fact that this country is made up of separate state governments administering different laws in different manners, requires that an individual state not have its laws stricken on the ground of unconstitutionality, where the decision relevant to determining such unconstitutionality is based on dissimilar and more inclusive laws from other states which were applied in factual contexts to which the law of the petitioning state would not have been applied. By analogy to this Court's holding in *Boddie v. Connecticut*, 401 U.S. 371, 379 (1970), that "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause," so the Commonwealth of Pennsylvania should be provided a forum in which to contest the constitutionality of its duly enacted statutes, and to prepare a record from which this Court can properly weigh the constitutionality of the death penalty in Pennsylvania. Cf. *Bartholomew v. State*, *supra* (dissenting opinion).

If this Court should order that the order below denying the Commonwealth's petition for an evidentiary hearing be

vacated, thereby permitting the evidentiary hearing desired by the Commonwealth, the Commonwealth is prepared to prove that, contrary to the concerns of Mr. Justice Stewart and Mr. Justice White in their opinions in *Furman*, the death penalty in Pennsylvania has not been applied rarely or capriciously; rather death sentences were imposed on 7.91% of all defendants convicted of first degree murder in this state since 1960. Those death penalties were imposed upon defendants in cases constituting the most heinous crimes committed in the Commonwealth in that period. Death penalties have been imposed in those cases whenever such cases arose (some of the most recent death penalties in Pennsylvania have been imposed in the cases of Donald Bryant, one of four defendants who robbed a sixty year old businessman, then beat him with a sledge hammer and finally attempted to decapitate him with a hacksaw; and the cases of Paul Gilly and Aubran Martin, convicted in the murder for hire slayings of Joseph A. Yablonski, his wife, and his daughter). Further, as to Mr. Justice Douglas' concern that the death penalty is more imposed upon members of minority groups or the poor, the Commonwealth's statistics demonstrate to the contrary.

A study of the *actual practice* in Pennsylvania over the period of 1960 to the present, as applied to the factors discussed by the United States Supreme Court Justices in *Furman v. Georgia*, reveals the following:

a. Since 1960, 430 defendants have been convicted of first degree murder in Pennsylvania. Of that number 34 (or 7.91%) have received the death penalty. Of the 430 defendants, 253 (or 58.60%) were black, and 162 (or 37.60%) were white. Of the 34 death penalties handed down in these cases, 19 (or 55.88% of death penalties) were as to black defendants and 14 (or 41.17% of death penalties) were as to white defendants. Of the 253 black defendants convicted of first degree murder, 19 (or 7.47%) of black defendants) were sentenced to death, while of the 162 white defendants convicted of first degree murder, 14 (or 8.63% of white defendants) were sentenced to death.

Thus, it can be seen that on the basis of race alone, no discrimination exists in the imposition of the death penalty in Pennsylvania.

b. Of the 430 defendants convicted of first degree murder, 310 (or 72.09% of all defendants) were represented by Court appointed counsel, and 120 (or 27.91% of all defendants) were able to retain private counsel. Of the 310 defendants represented by Court appointed counsel, 26 (or 8.38% of these defendants) received the death penalty. Of the 120 defendants who were able to retain private counsel, 8 (or 6.66% of these defendants) were sentenced to death.

Thus, it can be seen that while defendants represented by Court appointed counsel constitute a great majority of the defendants convicted, only 1.72% more of those defendants received the death penalty as opposed to defendants represented by privately retained counsel. It is therefore apparent that on the basis of poverty alone, there is no discrimination in the imposition of the death penalty in Pennsylvania.

c. Of the 430 defendants convicted of first degree murder, 305 (or 71.43% of all defendants) demanded jury trials, and 122 (or 28.57% of all defendants) pled guilty (the nature of disposition in three cases was unavailable, therefore the model is 427 cases). Of the 305 defendants who demanded jury trials, 24 (or 7.86% of those defendants) were sentenced to death; of the 122 defendants who pled guilty, 10 (or 8.19% of those defendants) received the death penalty.

Once again, it can be seen that while a considerably higher percentage of defendants demand trial by jury, a slightly lower percentage of those defendants received the death penalty as compared to those defendants who pled guilty. Thus, it is indicated that on the basis of nature of disposition alone, no discrimination existed in the imposition of the death penalty in Pennsylvania.

d. Of the 253 black defendants convicted of first degree murder, 79 (or 31.23% of black defendants) were able to afford private counsel, while of the 162 white defend-

ants convicted of first degree murder, 40 (or 24.69% of white defendants) were able to afford private counsel. It appears therefore that there is no correlation, in this context, between race and poverty as reflected in a defendant's ability to retain private counsel.

e. By combining the three factors discussed above at a, b and c, the lack of discrimination in Pennsylvania becomes more evident. Of the 430 total defendants, 128 (29.75% of all defendants) were black, had Court appointed counsel, and demanded trial by jury. Yet, only 8 (or 6.25% of these defendants) received the death penalty. By comparing this statistic to the fact that 7.91% of all defendants received the death penalty, it is obvious that no discrimination exists on the basis of the combination of these three factors.

It is apparent that, in Pennsylvania, the death penalty has been imposed on the basis of two dominant factors, and not on the basis of race, poverty or type of adjudication. Those factors are, in order of importance, the nature of the crime involved, and the defendant's prior criminal history. Both of these factors are such that the defendant, and only the defendant, has control of them. Of the 34 death penalties meted out in Pennsylvania since 1960, virtually all of them have been in cases which involved especially atrocious murders (*Cf.* the instant case, the Scoleri, Lopinson, Phelan and Coyle cases noted above, and the case of John Burgess, Elmo Smith, Paul Gilly, Aubran Martin, Carl Melton, etc.)

The Commonwealth is in the process, at this time, of gathering further facts concerning the intelligence level, educational background, psychiatric history and psychological history of each of the aforementioned 430 defendants, and will be prepared to present this additional information upon the occasion of an evidentiary hearing in the instant case should this Court so permit.

The Commonwealth respectfully urges that, upon proof of these statistics, the majority of the Justices of the United States Supreme Court would uphold the death penalty as applied in Pennsylvania.

A compilation of the Commonwealth's now completed analysis of the imposition of the death penalty in Pennsylvania since 1960, in terms of the criteria discussed by Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Douglas in *Furman*, is attached hereto as Appendix A. The Commonwealth respectfully requests that this Court consider whether these statistics are not necessary to a full consideration of the application of *Furman* in Pennsylvania.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD A. SPRAGUE
First Assistant District Attorney
ARLEN SPECTER
District Attorney

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DEATH PENALTY SURVEY—1960 TO PRESENT

		FIRST DEGREE MURDER CONVICTIONS—430 CONVICTIONS		DEATH PENALTIES—34 DEFENDANTS	
		NUMBER OF DEFENDANTS	PERCENTAGE OF GROUP	NUMBER OF DEFENDANTS	PERCENTAGE OF GROUP
AGE	Under 15	4	1.14%	0	0
	16 to 24	194	55.26%	16	8.24%
	25 to 34	93	26.52%	7	7.53%
	35 to 44	38	10.82%	5	13.10%
	45 to 54	19	5.12%	1	5.26%
	Over 55	4	1.14%	0	0
RACE	BLACK	253	58.60%	19	7.47%
	WHITE	162	37.60%	14	8.63%
SEX	MALE	414	96.28%	32	7.73%
	FEMALE	16	3.72%	2	12.50%
COUNSEL	COURT	310	72.09%	26	8.38%
	PRIVATE	120	27.91%	8	6.66%
ADJUD.	JURY TRIAL	305	71.43%	24	7.86%
	GUILTY PLEA	122	28.57%	10	8.19%

ND VERTICALLY

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,880

UNITED STATES OF AMERICA EX REL.
FRANK PHELAN, *Appellant*

v.

JOSEPH R. BRIERLY, Warden,
State Correctional Institution,
Philadelphia, Pennsylvania
(Eastern Dist. of Pa.—Misc. No. 4108)

Before SEITZ, *Chief Judge*, HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN and HUNTER, *Circuit Judges*

JUDGMENT ORDER

This case is before us on remand from the Supreme Court of the United States. That Court's judgment provides:

> ". . . [I]t is ordered and adjudged by this Court that the judgment of the said Court of Appeals in this cause be, and the same is hereby, vacated insofar as it leaves undisturbed the death penalty imposed; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Third Circuit for further proceedings. See Stewart v. Massachusetts, — U.S. — (1972)."

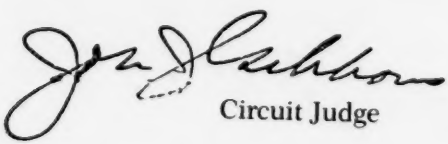
Our judgment was entered in an appeal from the denial of a petition for habeas corpus challenging petitioner's con-

finement pursuant to a Pennsylvania judgment imposing a death sentence. The judgment of the Supreme Court determines that on the present record this sentence is, on constitutional grounds, illegal. Petitioner did, however, plead guilty to the underlying charge, and the Supreme Court's judgment did not disturb the decision of this court as to the validity of petitioner's guilty plea or as to the validity of the Pennsylvania degree of guilt determination. Under these circumstances the writ must issue, but the Commonwealth should be afforded an opportunity to resentence petitioner in an appropriate proceeding.

It is therefore ORDERED and ADJUDGED that the cause be and is hereby remanded to the district court which shall enter an Order that the writ of habeas corpus shall issue to enlarge petitioner from custody unless, prior to the expiration of such reasonable period as the district court may in that order fix, an appropriate court of the Commonwealth of Pennsylvania shall, on notice to petitioner and after a hearing, have imposed on account of his guilty plea and the degree of guilt determination a new sentence other than the death penalty.

It is further ORDERED that this judgment order shall issue to the district court forthwith.

By the Court,



Circuit Judge

Attest:

THOMAS F. QUINN
Clerk

Dated: January 30, 1973

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,880

UNITED STATES OF AMERICA EX REL.
FRANK PHELAN,

Appellant

v.

JOSEPH R. BRIERLY, Warden,
State Correctional Institution,
Philadelphia, Pennsylvania

Before SEITZ, *Chief Judge*, HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS ROSENN and HUNTER, *Circuit Judges*

ORDER

The petition of the respondent for remand to the district court for an evidentiary hearing as to the constitutionality of the death penalty as applied in Pennsylvania is denied.

DATED: January 30, 1973.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
ex rel. FRANK PHELAN

v. MISC. NO. 4108

JOSEPH R. BRIERLEY, Warden

ORDER

This 1st day of February, 1973, pursuant to the mandate of the United States Court of Appeals for the Third Circuit, it is

ORDERED that the writ of habeas corpus shall issue enlarging petitioner, Frank Phelan, from custody unless, prior to the expiration of One Hundred and Twenty (120) days from receipt of this Order, the Commonwealth of Pennsylvania, after notice to petitioner and after hearing, shall have imposed upon the said Frank Phelan, on account of his guilty plea and the degree of guilt determination thereon, a sentence other than the death penalty.